



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 422 OF 2009

PAUL OTIENO MUNGLA.....PLAINTIFF

VERSUS

RAILWAY HOUSING CO-OP. SOCIETY LIMITEDDEFENDANT

RULING

The Application

The Plaintiff in his application by way of a Notice of Motion dated 6th May 2013 is seeking the following substantive orders:

That Moses Ndegwa Gitonga the 2nd Defendant/Judgment debtor herein be arrested and detained in prison for six (6) months or for such other subsequent periods as this Court may deem fit until he satisfies the decree herein dated 25th October, 2011.

That the properties of the 1st Defendant Railway Housing Co-operative Society Limited being:-

Account No. [particulars withheld], held at Barclays Bank Ltd, Haile Selassie Avenue branch and, Account No.[particulars withheld] held at Co-operative Bank Ltd, Co-op House Branch be and are hereby attached and frozen until the decree herein dated 25/10/2011 is satisfied.

The application is based on the grounds that there is on record a decree for specific performance dated 25th October 2011, and that the Defendants have both jointly and severally had ample time and opportunity to obey the decree but have willfully refused and or failed to do so, even after the Plaintiff furnished them with all documents and sums required. Further, that the Defendants' conduct in this matter constitutes a direct and bold affront to the dignity of this court that ought to be redressed by issuance of the orders sought herein.

The Plaintiff in his supporting affidavit sworn on 6th May 2013 averred that the decree herein was entered by consent of the parties on 25th October 2011, and the defendants given 90 days to comply therewith. He exhibited a copy of the decree. He further stated that this matter was subsequently mentioned on 24th January 2012, 1st March 2012 and 30th May 2012, to confirm compliance but that the Defendants have to date not complied with the order, despite requesting for more time to comply. Further that he furnished the Defendants with completion documents and the conveyance fee of Kshs.15,000/= on 31st October, 2011, and he annexed copies of the said documents in support of this deposition.

It was the Plaintiff's contention that the Defendants' joint and several conduct constitutes a bold and direct challenge to the authority and dignity of this court, and that it has become apparent that the Defendants

shall not comply with the decree unless coerced to.

The Plaintiff relied on his pleadings and in submissions filed in Court dated 26th March 2014 in reply to the 1st Defendant's submissions, wherein he argued that while it is trite law that an agent of a disclosed principal is not liable on a transaction lawfully entered into for and on behalf of the principal, in the present application the 1st Defendant was not an agent of a disclosed principal, as it declared that it was the sole sale agent but did not disclose the identity of its principal until later in the proceedings. Further, that the 1st Defendant acquiesced and participated fully in these proceedings and consented to the entry of the judgment against it on 25th October 2011, and is therefore estopped from denying its liability at enforcement stage.

The Responses

The 1st Defendant and 2nd Defendant filed replying affidavits to the Plaintiff's application dated 19th July 2013 and 5th September 2013 respectively.

The 1st Defendant stated that he only dealt with the Plaintiff as a selling agent of the 2nd Defendant with respect to the suit property, and that the main title in question from which the Plaintiff's plot was to be excised is registered in the name of the 2nd Defendant. Therefore, that he was an agent of a disclosed principal, and that liability for the failure to comply with the consent orders of 25th October 2011 lies solely upon the 2nd Defendant.

Further, that the 1st Defendant has on its part done all it could possibly do to comply with the consent orders now sought to be enforced. It was averred that it is solely for the 2nd Defendant to process the deed plans in question and have the main title subdivided, so that the title to the Plaintiff's subdivision can issue. However, that despite several reminders and follow ups by the 1st Defendant to the 2nd Defendant to expedite the process of issuance of the Plaintiff's title, the 2nd Defendant has failed to do so. The 1st Defendant attached various letters from its Advocates to the 2nd Defendant's Advocate in this respect.

The 1st Defendant also stated that the 2nd Defendant appreciates his personal liability in this matter as he has variously pleaded for more time to comply in Court. Further, that the orders sought in the said application as against the 1st Defendant are drastic and highly prejudicial to the 1st Defendant and its membership, and if granted would entirely paralyze its operations.

The 1st Defendant's Advocate filed written submissions dated 21st January 2014, wherein he reiterated the foregoing arguments, and relied on clauses 5 and 7 of the sale agreement dated 5th May 2005 between the Plaintiff and 1st Defendant in this respect. He also submitted that it is a trite common law principle that where an agent contracts expressly as an agent for a named and identifiable principal, then the third party's contract is with the principal, and it is only the principal who can sue or be sued on such a contract. He cited the decision in **Anthony Francis Wareheim t/a Wareheim & 2 Others vs Kenya Post Office Savings Bank, Civil Application No. Nai 5& 48 of 2002** as cited in **Victor Mabachi & Another vs Nurtun Bates Limited (2013) e KLR** in this respect.

The 2nd Defendant in its replying affidavit denied that he had refused to comply with the court decree dated 25/10/2011. He averred that he applied for, and obtained approval from the Municipal Council of Mavoko on 22/8/2008 and from the Commissioner of Lands on 30/12/2008 with respect to the transfer of title for sub-divisions of Plot No. 13 on the Parcel No. L.R 12715/141 into his name, and thereafter to transfer the same to the Plaintiff. He annexed copies of a Notification of approval of Development Permission and letter from the Commissioner of Lands in this respect.

The 2nd Defendant further denied that his efforts to procure the deed plan constitutes a challenge to the authority and dignity of the court, and averred that the delay in procuring the said deed plan to facilitate the sub-division and transfer of plot No. 13 of L.R No. 12715/141 to the Plaintiff has been occasioned by

the many procedures attendant to land matters from the relevant authorities.

The 2nd Defendant contended that he was ready and willing to comply with the Court order dated 25/10/2011, and was in the process of complying with the said court order as shown by his effort to get a licensed land surveyor to liaise with the Director of Surveyors to enable sub-division of L.R. No. 12715/141. That in addition he had made an application for registration of transfer dated 23/7/2013 through his former Advocates, M/S Wamaitha Kangethe Advocates to facilitate the completion process. Further, that he subsequently obtained a transfer of plot No. 13 on L.R 12715/141 into his name, which transfer was done on 14/8/2013. He annexed copies of a letter by Geodata Land Surveyors and Consultants, an application for registration of transfer dated 23/7/2013 and the said title in support of his averments.

The 2nd Defendant's Advocate filed written submissions dated 28th March 2014, wherein he urged that the Plaintiff had not met the requirements for committal of the 2nd Defendant to civil jail as provided in **Mutitika vs Baharini Farm Ltd (1985) KLR 229**, as he had not demonstrated that the 2nd Defendant had deliberately disobeyed the orders of the Court. Further, that the true position was that the 2nd Defendant has made efforts to ensure that the suit property is registered in the Plaintiff's name.

The Issues and Determination

I have carefully considered the pleadings and submissions made by the parties. The main issues for determination are whether the 2nd Defendant herein can be committed to prison for non-satisfaction of the Court's decree, and whether the property of the 1st Defendant can be attached for the same reason. The Plaintiff has brought his application pursuant to Order 22 Rule 28 of the Civil Procedure Rules which provides as follows:

“(1) Where any party against whom a decree for the specific performance of a contract, or for an injunction, has been passed, has had an opportunity of obeying the decree, and has wilfully failed to obey it; the decree may be enforced by his detention in prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation the decree may be enforced by the attachment of the property of the corporation.”

The principles that apply to arrest and committal to prison as a form of execution of a decree as stated in **Judicial Hints on Civil Procedure Volume 1** by Richard Kuloba at page 199 is that this is an acceptable and ordinary means of enforcing a decree, and that in proceedings to commit a debtor for a civil debt the preoccupation of the court is the execution of the decree which is sought to be executed. Further, that considerations of the flagrant disobedience to a court order do not arise, and the court need not inquire whether there has been proved anything in the nature of contempt. However, this is subject to such conditions and limitations as may be prescribed in the Civil Procedure Act and Rules. It is my view that the same principles also apply to execution by way of attachment of moveable property.

It has also been held in various judicial decisions that it is normal and procedural to execute decrees by committal to civil jail, as long as the safeguards under the relevant provisions of the *Civil Procedure Act* and the Rules made thereunder are complied. See in this respect **Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67 and Jayne Wangui Gachoka vs. Kenya Commercial Bank Petition Number 51 of 2010.**

The applicable safeguards that need to be observed in an application for committal to jail and attachment of attachment of movable and immovable property with respect to a decree for specific performance were noted in **Industrial & Commercial Development Corporation vs Onyango (1983) KLR 416**, where it was held that the only safeguard that requires to be applied is where the application for execution is made more than one year after the date of the decree, or against the legal representative of a party to a

decree as provided in Order 22 Rule 18 of the Civil Procedure Rules as follows:

“(1) Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him”

In the present application the decree herein that was annexed by the Plaintiff as his annexure “PM-1” was issued on 5th March 2012. The Notice of Motion for the committal to prison of the 2nd Defendant and attachment of the 1st Defendant’s property was filed on 7th May 2013 which was after one year from the date of issue of the decree. In addition, the Plaintiff did not bring any evidence of previous execution proceedings that he had commenced against the Defendants.

In the premises and in light of the provisions of Order 22 Rule 18(1), the Plaintiff’s Notice of Motion is incompetently before the Court for failure to issue a notice to show cause to the Defendants. The Plaintiff is however at liberty after issuance of the necessary notice to show cause to proceed with the said proceedings of committal to prison and attachment as against the Defendants.

The prayers in the Plaintiff’s Notice of Motion dated 6th May 2013 are accordingly denied for the foregoing reasons, and each party shall meet their own costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 10th day of March, 2015.

P. NYAMWEYA

JUDGE